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IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 886

STERLING DRUG INC.,
Petitioner,

v.

FARBENFABRIKEN BAYER A. G.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 1, 1958.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Sterling Drug Inc. (hereinafter "Sterling") prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review a decision of that Court reversing an order of the United States District Court for the District of New Jersey. The District Court had held that respondent Farbenfabriken Bayer A. G. (hereinafter "Farben"), whose status as an enemy alien with respect to the claims alleged in this action had been continued by Congressional Joint Resolution 289, could not sue in an American court to enforce those claims until such time as its status with respect to such claims had been changed.

Opinions Below

The opinion of the Court of Appeals has not yet been reported, and is printed as Appendix A, *infra*. The opinion of the District Court is reported at 148 F. Supp. 733, and is printed as Appendix B, *infra*.

Jurisdiction

The judgment of the Court of Appeals is dated, and was filed on, January 2, 1958.

The jurisdiction of this Court is invoked under 62 Stat. 928 (1948), 28 U.S.C. §1254 (1) (1952).

Question Presented

1. Did Congressional Joint Resolution 289 of October 19, 1951, terminating the state of war with Germany with the express proviso that "Nothing herein and nothing in such proclamation [by the President] shall alter the status • • • of any person with respect to any • • •" property which was subject to vesting prior to January 1, 1947, mean that the status of Farben as an enemy alien with respect to such property was thereby changed from the status of disqualification to sue in our courts to the status of full qualification to sue in our courts?

Statutes Involved

The statute involved is the Trading With the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§1-40 (1952), as amended, 50 U.S.C.A. App. §§6(b), 9, 20, 32, 33, 39 (Supp. 1957). Relevant portions of that Act are printed in Appendix C, *infra*.

Also involved is Congressional Joint Resolution 289, October 19, 1951, 65 Stat. 451, 50 U.S.C. App. notes prec. §1 (1957). Its text is as follows:

"That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act of Germany or of any person with respect to any such property or interest."

Statement of the Case

Sterling ("Sterling" will refer herein both to the present petitioner and to its predecessor company, Sterling Products [Incorporated]), is a Delaware corporation engaged in the development, manufacture, distribution and sale of drugs and pharmaceutical products.

Farben is a corporation organized under the laws of the Federal Republic of West Germany, and is also engaged in the pharmaceutical and other businesses (App. 3a*). Farben asserts that it is the postwar successor and as-

* The pages of Farben's Appendix in the Court of Appeals are numbered and cited 1a, 2a, 3a, etc.; the pages of Sterling's Appendix therein are numbered and cited 1b, 2b, 3b, etc.

signee of the giant German trust, I. G. Farbenindustrie A. G., with respect to the claims here sought to be enforced (App. 3a-4a). (Hereinafter "I. G. Farben" will designate both the trust and the predecessor companies which were merged in 1926 in the organization of the trust).

On September 28, 1955, Farben filed two separate actions against Sterling in the United States District Court for the District of New Jersey. Federal jurisdiction was asserted to be based on 62 Stat. 930 (1948), 28 U.S.C. §1332(a)(2) (1952) (App. 3a). Both complaints assert claims based upon certain illegal cartel agreements which were entered into between I. G. Farben and Sterling and its subsidiaries or affiliates in the 1920's.

Briefly, one action was an antitrust action seeking, among other things, to compel Sterling to grant to Farben licenses under certain trade-marks and patents owned by Sterling or its subsidiaries or affiliates since prior to 1941, and allegedly transferred thereto by I. G. Farben during the 1920's and 1930's pursuant to the illegal cartel agreements.

The second action, which is the one before this Court, seeks an accounting and damages for the alleged breach in 1941 of one of the illegal cartel agreements. This complaint was dismissed by the District Court on the ground that the claims alleged therein constituted property subject to vesting or seizure on and prior to January 1, 1947, and that under the terms of Congressional Joint Resolution 289 of October 19, 1951, terminating the state of war with Germany, Farben's status as an enemy alien was expressly reserved as unchanged with respect to such property. The District Court therefore concluded that Farben could not maintain this suit at this time (App. B, p. 7).

This decision was reversed by the United States Court of Appeals for the Third Circuit, which held that the effect of the Joint Resolution, despite the express language of the proviso thereto, was to remove completely Farben's status as an enemy alien in respect of its prior disqualification to sue, even with respect to property subject to vesting and seizure on and prior to January 1, 1947 (App. A, pp. 6-8).

A. Background.

Prior to the outbreak of World War I in 1914, I. G. Farben had created a wholly-owned subsidiary in the United States named The Bayer Company, Inc. (hereinafter "Bayer"), a New York corporation (App. 4a-5a).

In January, 1918, after the United States declared the existence of a state of war with Germany, the capital stock of Bayer was vested by the Alien Property Custodian for the United States Government (App. 5a). In December, 1918, Sterling purchased all the vested capital stock of Bayer from the Alien Property Custodian; thereafter, Bayer operated as a subsidiary of Sterling, continuing both its domestic and export pharmaceutical business (App. 5a). Bayer has since been merged into Sterling (App. 8b).

When Sterling purchased the Bayer stock in 1918, Bayer was the owner in the United States of many duly registered trade-marks and trade-names, including "Bayer" and the Bayer Cross (which consists of the vertical and horizontal spelling of the name "Bayer", in cross fashion, against a circular background) (App. 4a-5a). Sterling still owns and uses these trade-marks and trade names. In addition, Bayer owned trade-marks and trade names in various countries in Latin America, where it had also done business (App. 5b).

B. The 1929 Latin American Aspirin Cartel Agreement.

In 1929, I. G. Farben and Bayer entered into the agreement which is Exhibit "A" to the complaint in the present action (App. 23b). This contract related to the aspirin business in Latin America and eliminated competition in that area between the two companies in sales of aspirin and certain other pharmaceutical products. Under the terms of the agreement, I. G. Farben received all of the Latin American trade-marks and trade names relating to aspirin and these other products. It in return licensed the use of those trade-marks and trade names to Bayer, which was permitted to conduct the joint aspirin business, provided it did so through I. G. Farben agents wherever possible. I. G. Farben was to receive 75% of the profits and Bayer was to receive 25%.

The parties operated under this contract from 1929 to 1941, when Bayer completely and finally ceased its performance because of (1) the direction of the United States Government, pursuant to its program of economic warfare against Germany, that Bayer cease such performance; and (2) the entry of a consent decree declaring the contract illegal and void under the federal antitrust laws and enjoining Bayer's further performance thereof, *United States* v. *Alba Pharmaceutical Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,150 (S.D. N.Y. 1941).

C. The Additional 1923 Cartel Agreements Dividing the World Pharmaceutical Market.

In 1923, I. G. Farben and Sterling, and certain of the latter's affiliates or subsidiaries at that time, entered into several additional agreements, which in 1926 were modified in certain respects and reaffirmed when I. G. Farben itself was formed from the merger of its predecessor companies

and became a party to the contracts (App. 9b). These contracts have been described as "the usual form of international cartel arrangement," *United States* v. *Bayer Co.*, 135 F. Supp. 65, 69 (S.D. N.Y. 1955).

The agreements provided for a division of world sales territories in pharmaceutical and related products (App. 9b-10b). Sterling and its affiliates or subsidiaries were required to limit their sales of these products (except aspirin in Latin America) to markets in the United States, Canada and Cuba. I. G. Farben was freed from Sterling's competition in the rest of the world, and in addition was given one-half of Sterling's profits from its Cuban sales. Further, I. G. Farben received one-half of the profits (and subsequently one-half of the stock) of Sterling's American subsidiary in the ethical drug business, Winthrop Chemical Co., Inc., and Sterling's English subsidiary, Bayer Products, Ltd. I. G. Farben in return agreed to assign to Sterling or its affiliates or subsidiaries any rights within their respective territories to patents, trademarks and trade names on any new developments in the field of pharmaceuticals and related products (App. 9b).

The parties operated under these agreements also until 1941, when Sterling and its affiliates and subsidiaries completely and finally ceased their performance, again because of (1) the direction of the United States Government, pursuant to its program of economic warfare against Germany, that performance be halted; and (2) the entry of a second consent decree declaring the contracts illegal and void under the federal antitrust laws and enjoining Sterling's further performance thereof, *United States* v. *Bayer Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶56,151 (S.D. N.Y. 1941).

For nearly two decades the parties performed under these agreements, and benefits flowed both ways (App. 10b).

I. G. Farben received substantial sums of money and, eventually, one-half of the stock of two of the principal Sterling subsidiaries, Winthrop Chemical Co., Inc. and Bayer Products, Ltd. In addition, I. G. Farben was free from competition by Sterling and its affiliates or subsidiaries in most of the markets of the world. Sterling in turn benefited through the receipt by Winthrop Chemical Co., Inc. of certain of I. G. Farben's new developments for exploitation in its sales territories, including the United States (App. 10b).

D. The 1941 Department of Justice Investigations Preliminary to the Consent Decrees.

During a five-month period of 1941, under a grand jury subpoena addressed to Sterling and dated April 10, 1941, the Antitrust Division of the Department of Justice conducted an investigation of the cartel agreements referred to above. This investigation was conducted in the United States District Court for the Southern District of New York, and was under the direction of Thurman Arnold, at that time head of the Antitrust Division, and who is counsel for Farben in the present action (App. 10b).

As a result of the investigation, Mr. Arnold informed Sterling that each of the contracts was illegal under the antitrust laws and that Sterling had to terminate its performance thereof. Negotiations were promptly entered into with Mr. Arnold. After rejecting early proposals, Mr. Arnold finally cleared two proposed decrees which were entered on September 5, 1941 in two civil actions brought by the Department of Justice in the United States District Court for the Southern District of New York. Mr. Arnold consented to both decrees on behalf of the United States (App. 10b-11b).

Two decrees were entered: one in *United States* v. *Alba Pharmaceutical Co.* and the other in *United States* v. *Bayer Co.* (Civil Actions Nos. 15-363 and 15-364), CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶¶56,150-1 (S.D. N.Y. 1941). Sterling was a defendant in each action; the other parties were Alba, Bayer and Winthrop, all affiliates or subsidiaries of Sterling. I. G. Farben was not a party to either decree (App. 11b).

The *Alba* decree declared unlawful the Latin American aspirin contract of 1920, upon which the suit at bar is based, and enjoined Bayer from further performance thereof. Bayer was also compelled to terminate, no later than December 31, 1941, all arrangements with I. G. Farben under that agreement, and to surrender all licenses for the use of I. G. Farben's trade-marks in Latin America. All payments by Bayer to I. G. Farben were also prohibited (App. 11b).

The *Bayer* decree declared unlawful the 1923 division-of-territory agreements, and enjoined Bayer and Sterling from the performance thereof (App. 11b).

Both decrees provided that the right, title and interest of Sterling or its affiliates or subsidiaries in any patents, trade-marks and trade names ("such as the name 'Bayer', the 'Bayer Cross' mark and registration thereof") were neither affected nor diminished (App. 12b).

On the same day that the decrees were entered, the Department of Justice issued a press release which stated:

> "Under terms of the consent decrees, signed by Judge Mandelbaum, *all agreements between Sterling and its subsidiaries, on one hand, and between I. G. Farben and its predecessors, on the other, are declared illegal and terminated.** The decrees fur-

* Emphasis ours throughout.

ther provide that Sterling and its subsidiaries shall not by agreement with any other manufacturer of drugs, including I. G. Farben, refrain from entering into any foreign market.

"This will make the products of the American companies available to the Latin American republics whose source of supply has been cut off because of war conditions.

"It is anticipated by the Department that as a result of the decrees there will be increased participation by these American firms in the Latin American market for pharmaceutical products." (Department of Justice, Press Release, September 5, 1941)

Shortly thereafter, on September 25, 1941, Mr. Arnold issued his own release, which stated in part:

"The settlement of this case was eminently satisfactory to me personally and to all the members of my staff who worked on it.

• • • •

"In this case a consent decree was necessary to invalidate *for all future time the illegal contracts on which the criminal information was founded, to prevent the German Dye Trust* [plaintiff's claimed predecessor] *from relitigating the same questions in civil suits between private parties, and to prevent the reestablishment of any future relationship of the same kind between Sterling and the German Dye Trust.*

• • • •

"The decree in this case, however, has many positive advantages in the present emergency. German control of drug outlets in South America has been one of the most effective instruments of propaganda and German influence in this hemisphere. There is an imperative necessity that American concerns build up their own outlets. In spite of the fact that in 1926, in the era of non-enforcement of the antitrust laws, Sterling Products was attempt-

> ing to eliminate competition along with hundreds of other American companies, it still remains an efficient organization for the distribution of drugs. That organization in the present emergency must not be destroyed, nor its efficiency hampered; instead of that, it must receive every assistance in the long and expensive process of establishing American outlets for drugs in this hemisphere." (Department of Justice, Press Release, September 25, 1941)

Immediately after entry of the consent decrees, Sterling undertook all steps required of it to comply therewith, and at no time since has Sterling, its affiliates or subsidiaries performed any of the unlawful agreements or any provisions thereof (App. 13b). Farben admits that its alleged predecessor received notice of the consent decrees within three months of their entry (App. 12a). It was thus on notice before the end of 1941, and prior to the entry of the United States into World War II, that Sterling had repudiated the cartel agreements at the direction of the United States Government, and would never again perform them or any of their provisions (App. 13b-14b).

E. The Nature of the Claims Asserted by Farben.

The claims which Farben now urges against Sterling are necessarily derived from Sterling's repudiation of the cartel agreements in 1941. If Sterling is liable for its failure to perform those agreements, its liability, just as its failure, was complete in 1941; if Sterling is liable to account to Farben under the cartel agreements, such liability was likewise complete in 1941. Such claims are clearly "property" within the meaning of §7(c) of the Trading With the Enemy Act, and could have been vested at any time after the United States entered the war. This has been conceded by Farben in its briefs in the court below.

The District Court ruled that Farben's status as an enemy alien with respect to these claims was preserved by

the express language of Congressional Joint Resolution 289. It held further that this status bars Farben from seeking to enforce these claims in an American court until such time as that status is duly changed (App. B, p. 7).

This decision was reversed by the Court of Appeals for the Third Circuit, which held that the Joint Resolution, despite its specific language, did not preserve such enemy alien status (App. A, pp. 6-8).

Reasons for Granting the Writ

A. The Importance of the Question Presented.

The decision below presents a serious question in the administration of the Trading With the Enemy Act. It not only affects the right to bring suit with respect to property (like that in the case at bar) which, although subject to vesting, was never vested; it also affects the right to bring suit with respect to all property which was actually vested, since Congressional Joint Resolution 289 treats the two kinds of property in identical fashion.

If the decision below is allowed to stand, it will nullify the effectiveness of the extensive program of vesting and seizure of enemy assets carried on by the United States Alien Property Custodian under the provisions of the Trading With the Enemy Act. Of the assets (or the proceeds thereof) vested in the course of that program during World War II, $225,000,000.00* has been transferred to the War Claims Fund for the payment therefrom of American war claims. However, $262,470,000.00** worth of property still remains in the care of the Attorney General as successor*** to the Custodian and is available

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* S. Rep. No. 1347, 85th Cong., 2nd Sess. 8 (1958).

** (As of December 31, 1956) *Ibid.*, p. 2.

*** Exec. Order No. 9788, October 14, 1946, 3 C.F.R. 575 (1957); *Kaufman* v. *Societe Internationale*, 343 U. S. 156, 157, n. 1 (1952); *Cities Service Co.* v. *McGrath*, 342 U. S. 330, 331, n. 1 (1952).

for the payment of debt claims of non-enemy creditors (§34 of the Trading With the Enemy Act) and for future transfer to the War Claims Fund.

Prior to the decision below, it had been universally considered to be law that no German national who, like Farben, was an "enemy alien", was eligible to bring suit to recover such vested property under §9(a) of the Act.*

The ruling of the Court of Appeals in this case completely undoes this. By this decision, the Court of Appeals for the Third Circuit has opened American courts and indeed invited the filing therein of lawsuits against the Attorney General for the return of every piece of vested property (or the equivalent).** It has accomplished this result by removing the continuing "enemy" status imposed by Congress in Joint Resolution 289, with respect to the properties seized, on such would-be claimants.***

The first question presented below was whether Congressional Joint Resolution 289, terminating World War

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* The question to what extent the law should be changed to permit the return to German nationals of such property is a political question which has received considerable Congressional attention. See, e.g., in the last three Congresses: S. 411, S. 1302, H.R. 2537, H.R. 3356, H.R. 4425, H.R. 5647, 85th Cong. 1st Sess. (1957); S. 854, S. 995, S. 2227, H.R. 2102, H.R. 2135, H.R. 3242, H.R. 5840, H.R. 6730, H.R. 6970, 84th Cong., 1st Sess. (1955); S. 3507, S. 3763, S. 4205, H.R. 10889, 84th Cong., 2d Sess. (1956); S. 146, S. 151, S. 155, H.R. 3174, H.R. 3594, H.R. 4926, H.R. 5064, 83d Cong., 1st Sess. (1953); S. 3423, H.R. 9076, H.R. 9475, 83d Cong., 2d Sess. (1954).

** In the case of German nationals alone, vested assets totaled $541,450,000, as of December 31, 1956, S. Rep. No. 1347, 85th Cong., 2d Sess. 2 (1958).

*** There is no answer to this in the court's hint that Farben might have to obtain a license before enforcing any judgment which might be entered in its favor in this case. Section 9(a) of the Act requires return of property to anyone who (1) is qualified to maintain a suit under that Section, and (2) establishes that he is the owner of the vested property. The effect of the court's decision is that any German national, like Farben, can now satisfy the first requirement; and that requirement is the only obstacle to wholesale return.

II between the United States and Germany, preserved Farben's "enemy" status with respect to the claims here sued upon. That resolution provided that "Nothing herein * * * shall alter the status, as it existed immediately prior thereto, under that [the Trading With the Enemy] Act, of Germany or of any person with respect to" any property subject to vesting prior to January 1, 1947. Farben conceded that the claims upon which it has sued in this case are property which was subject to vesting (although never actually vested) prior to January 1, 1947. It is also undisputed that Farben is a corporation organized under the laws of Germany, and as such, had the "status * * * under the Act" of an "enemy".

Had the answer to the first question been that Farben's status with respect to this property remained unchanged, the court would have then been required to decide whether Farben is still disqualified, by the rule barring enemy aliens from access to American courts, to bring suit at this time on these claims. The court below admitted in its opinion that such a disqualification does attach to an enemy alien, and that this rule is recognized by the Trading With the Enemy Act (App. A, pp. 4-5). However, it also held that the Joint Resolution, despite the express language of the proviso contained therein, did not have the effect of continuing a German corporation as an enemy alien with respect to claims situated in this country during World War II and admittedly subject to vesting (App. A., pp. 6-8)

Although the court below was primarily concerned with claims subject to vesting but never in fact vested, the proviso which its opinion construes is equally applicable to property actually seized by the Alien Property Custodian. The first sentence of that proviso explicitly states that "any property or interest which prior to January 1, 1947 was subject to vesting or seizure under the provisions

of the Trading With the Enemy Act * * * *or which has heretofore been vested or seized under that Act* * * * shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted * * *." There has been no subsequent Congressional enactment removing any such property or interest from the provisions of that Act.

§7(c) of the Act provides that one who seeks the return of property taken from him under the vesting program must find his remedy, if any, within the terms of the Act.

The sole procedure available to a claimant such as a German citizen or corporation is set forth in §9(a). It permits "any person not an enemy or ally of enemy," and who claims any right, title or interest in property vested by the Alien Property Custodian, to file a claim with the Custodian (or the Attorney General) for the return of all or part of such property. If the claim is not acted upon within 60 days, such person may institute suit in a federal court "to establish the interest, right, title or debt so claimed, and if so established the Court shall order the payment * * * to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled." The *only* qualification is that the claimant show that he is "not an enemy or ally of enemy."

However, the Court of Appeals below has ruled that a German is no longer an "enemy," even with respect to property or interests which were vested or subject to vesting prior to January 1, 1947. It held that, in passing the Joint Resolution:

> "Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies * * *". (App. A, p. 6)

Thus, it has removed the only obstacle standing in the path of those demanding the return of property legally and properly taken from them, and has invited claims against the United States for the full amount of the property seized. This is a result certainly never contemplated by Congress.

B. The Erroneous Construction of the Joint Resolution.

The court below was able to reach its decision by assuming, at the outset, the very proposition in issue. Thus, in the first sentence of the opinion, Farben is described as a "*former* enemy alien" (App. A., p. 1). The characterization of Farben as a "former enemy alien" of course subsumes the real question presented, *i.e.*, whether such "enemy" status has been preserved to date. As if to add authority, this characterization is repeated frequently, and the fourth paragraph even contains this sentence: "It is *agreed* that Farben *was* an enemy alien" (App. A., p. 4).

Of course, no such characterization was ever agreed to by Sterling. Rather, it has argued consistently both in the District Court and in the Court of Appeals that, with respect to the claims asserted here, Farben has remained an enemy alien; and that as such, it is disqualified to appear as a plaintiff in an American court.

Noting that the proviso of the Joint Resolution preserved unchanged the "status • • • of Germany or of any *person*", Sterling has contended that this continuing enemy status is a *personal* status. However, the Court of Appeals has incorrectly described Sterling's position as being concerned with "the 'status' of the *property* under the Joint Resolution" (App. A., p. 3). This emphasis on "*property*", which displays a complete failure to grasp

Sterling's argument, and which is unwarranted by the clear language of the Joint Resolution, is then used by the court, in the only paragraph of its opinion devoted to the question, to explain away that express language (App. A., pp. 7-8). It limits the term "status" to "a relationship to property, *viz.*, ownership of property or a right to possess property" (App. A., p. 7). Therefore, it is said that neither "the right to bring a suit" nor the right of "access to a court" may be described as a "status", and that Farben is entitled to maintain the present action.

Sterling does not dispute the conclusion that neither of these rights constitutes a "status". It insists that there is but *one* "status" involved in this case, *i.e.*, the continuing enemy "status" imposed on Farben by the Joint Resolution. The disability to maintain the present action, far from being even a separate status, is an *incident* of enemy status that attaches, by operation of law, to an enemy alien.

The opinion below demonstrates the failure of the Court of Appeals to perceive the true purpose of the proviso to the Joint Resolution, and the relationship between the two sentences which comprise it. An examination of the crucial language of the first sentence of the proviso indicates a clear Congressional intent to preserve all rights of the United States Government, under the Trading With the Enemy Act, against any property which had been subject to vesting prior to January 1, 1947, whether or not such vesting had actually occurred. It stated specifically that it dealt with a "property or interest." The claims which Farben seeks here to enforce concededly fall within this category. Such "property or interest" continued to be as subject to the vesting powers as if a state of war continued, *i.e.*, "* * * as if this resolution had not been adopted and such proclamation [by the President] had not been issued."

This was in accordance with the express desire of the President, who had stated that "* * * it is not intended that the termination of the state of war shall in any way change or alter the program * * * under the Trading with the Enemy Act", Letter from Harry S. Truman to Alben W. Barkley, July 9, 1951.

During the continuation of the state of war, non-resident enemy aliens are normally barred from access to United States courts, *Johnson* v. *Eisentrager*, 339 U. S. 763, 776 (1950); *Ex parte Colonna*, 314 U. S. 510, 511 (1942). Immediately upon the declaration by the United States on December 11, 1941, that a state of war existed between the United States and Germany (Joint Resolution 119, 55 Stat. 796, 50 U. S. C. App. notes Prec. §1 [1952]), any German corporation such as Farben's alleged predecessor, I. G. Farben, automatically became an "enemy" within the definition of that term in §2(a) of the Trading With the Enemy Act:

> "Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

Thus, at no time after December 11, 1941 and prior to the termination of the war, was Farben or I. G. Farben qualified to bring this suit or any other suit in any court in the United States.

But for the proviso, German nationals would have ceased to be "enemies," and would have had free access to Ameri-

can courts upon termination of the state of war. Thus, it was necessary to limit the access granted them. Sterling concedes that American courts are open to Farben on any cause of action accruing to it after January 1, 1947. But certain claims, i.e., those relating to property which had been vested or which was subject to vesting prior to January 1, 1947, were excluded from the class of actions upon which suit could be brought.

An express proviso was enacted with respect to:

> "• • • any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act • • •."

As to that property:

> "• • • Nothing herein and nothing in such proclamation [by the President] shall alter the *status*, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

The meaning of this sentence was so clear that it received no elaboration in the Congressional debates. Since the only "status" conferred by the Trading With the Enemy Act is "enemy" status, the phrase "status • • • under that Act" was an unmistakable reference to the definition of "enemy" in §2(a).

This Court has confirmed that Congress intended to bar all those within the category of "enemy" under §2(a) of the Act from access to American courts, *Ex parte Kawato*, 317 U. S. 69 (1942). Plaintiff there was a Japanese resident in this country. Noting that §2(c) of the Act authorized the President to include, by proclamation, within the term "enemy," certain named groups not otherwise included, this Court said:

> "• • • [T]he President [has] not seen fit to use the authority possessed by him under the Trading With the Enemy Act to exclude resident aliens from the courts • • •". (p. 77)

Nowhere in the legislative history of the Joint Resolution is there even a hint that American courts were to be opened to suit on claims which had been located in this country throughout the period of hostilities, and which consequently had been, and still were, subject to vesting and seizure by the Alien Property Custodian. The entire tone of both the President's letter and the Senate Report (S. Rep. No. 892, 82d Cong., 1st Sess. [1951]), is in the future.

In both of these documents, the term "status" is repeatedly used in a context which makes it certain that the President and Congress both thought of a German's status as "enemy." Said the President:

> "• • • [Germany is to be lifted] from its present *enemy status* • • • [Germans in this country] will receive the *status* accorded to nationals of other free governments. They will no longer be classed as *enemies*."

Said the Senate Report:

> "• • • We should remove the disability 'of *enemy status*' which now applies to German nationals • • •".

This interpretation of "status" was confirmed in the Presidential Proclamation issued pursuant to the Joint Resolution, which stated:

> "WHEREAS it has • • • been considered desirable • • • to remove Germany from its present *enemy status* • • •". Proc. No. 2950, October 24, 1951, 3 C.F.R. 51 (1951).

There is no reason to suppose that the term "status", as it finally appeared in the text of the Joint Resolution, had a different meaning.

The Court of Appeals held that the sole purpose of the proviso was to preserve the powers of vesting and seizure of the United States Government. However, this position overlooks the fact that both sentences of the proviso applied to any property or interest subject to seizure or *already seized*. Inclusion of the latter category was not accidental. Congress sought to continue the disqualification to sue with respect to *all* German property situated in this country prior to January 1, 1947.

The decision below renders the last sentence of the proviso totally superfluous and devoid of any meaning. It violates the well-settled rule of construction that a legislative enactment is to be given that construction which imports a harmonious meaning to all of its provisions, rather than that which completely and unnecessarily strips one provision of all significance, *United States* v. *Menasche*, 348 U. S. 528, 538-9 (1955).

The decision below also violates another well-settled rule of construction. An action brought by a wartime enemy seeking the return of vested assets from the Attorney General is a suit against the United States. The opportunity to sue the sovereign is a matter of legislative grace, granted or withheld as Congress in its wisdom shall see fit. Since it is a matter of grace, and not of right, any such grant must be narrowly construed, *McMahon* v. *U. S.*, 342 U. S. 25 (1951).

C. The Conflict with Decisions of Other Courts.

The clarification of restrictions imposed by, and the remedies open under, the Trading With the Enemy Act, is a sufficient ground *per se* for the grant of certiorari, *Guessefeldt* v. *McGrath*, 342 U. S. 308, 310 (1952).

In addition, the decision below, which in effect permits a wartime enemy to bring suit against the United States for the return of property taken from him under the provisions of the Trading With the Enemy Act, is in conflict with the recent decisions of courts in Circuits other than the Third Circuit. See, *e.g.*, the following cases, in each of which suit was filed after the passage of the Joint Resolution, and the plaintiff was denied recovery because of his "enemy" status: *Rusche* v. *Brownell*, 244 F. 2d 782 (D.C. Cir. 1957); *Hansen* v. *Brownell*, 234 F. 2d 60 (D.C. Cir. 1956); *Albert* v. *Brownell*, 219 F. 2d 602 (9th Cir. 1954); *Cordero* v. *Brownell*, 211 F. 2d 90 (2d Cir. 1954); *Kober* v. *Brownell*, 149 F. Supp. 510 (N.D. Cal. 1957); *Central National Bank* v. *Brownell*, 137 F. Supp. 686 (N.D. Ohio 1956).

The opinion is also in conflict with the only litigated decision which has been found in which the proviso of the Joint Resolution was construed with respect to property which, though subject to vesting, was never actually vested. There the same result was reached as by the District Court in the present case. That decision is *Dresler* v. *Greeff*, 282 App. Div. 465, 124 N.Y.S. 2d 412 (1st Dept. 1953).

There, plaintiffs were German nationals who had brought suit in the New York courts in 1938. Prior to trial, war was declared between the United States and Germany, and further prosecution of the action was consequently suspended under the Trading With the Enemy Act. As the record and briefs in that case show, a stipulation was then entered into between the parties providing that the action might be dismissed if the case were not restored to the calendar within "one year after the disability of said plaintiffs under the Trading with the Enemy Act to prosecute said action shall cease." The stipulation also provided that neither party could restore

the case to the calendar within one year after the removal of the disability.

More than one year after the passage of the Joint Resolution, defendants moved to dismiss for lack of prosecution upon the theory that, with the enactment of the Joint Resolution, the disability of the enemy plaintiffs to sue had been removed. The motion was granted at Special Term.

Upon appeal, the order was reversed, the court holding that plaintiffs' right to prosecute was still suspended by the terms of the Joint Resolution. Correspondingly, plaintiffs' cross-motion to restore the case to the calendar was denied.

In holding that the plaintiffs' disability to sue had not been removed by the passage of Joint Resolution 289, the Appellate Division of the New York Supreme Court stated:

> "This action involves property interests which under the provisions of the Trading With the Enemy Act were subject to vesting prior to January 1, 1947. In 1942, when the stipulation in issue was signed, the German aliens were enemy nationals. It would appear from a reading of the resolution that for the purposes of prosecuting this lawsuit their status remains unchanged." 282 App. Div. at 466, 124 N. Y. S. 2d at 413-414.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1, 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,226

FARBENFABRIKEN BAYER A. G.,
Appellant,

v.

STERLING DRUG, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 11, 1957

Before BIGGS, *Chief Judge*, and MARIS and MCLAUGHLIN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 2, 1958)

By BIGGS, *Chief Judge.*

The plaintiff, Farbenfabriken Bayer A. G. (Farben), a corporation organized under the laws of the Federal Republic of West Germany, a former enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act, 50 U.S.C.A., App. §2(a), seeks an accounting and other relief against Sterling Drug, Inc. (Sterling), basing

its claims on alleged breaches of a cartel agreement, occurring in 1941 or soon thereafter. These claims, choses-in-action, constitute "property" within the meaning of the Act, Propper v. Clark, 337 U.S. 472, 480 (1949), and were not seized by the Alien Property Custodian though subject to seizure and vesting under Section 5(b), 50 U.S.C.A. App. §5(b). Sterling contends that Farben has no right to "institute or maintain" its action, in view of the limitation or reservation contained in Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U.S.C.A. App. XX. Sterling moved for judgment on the pleadings under Rule 12(c) and for summary judgment under Rule 56(b), Fed. R. Civ. Proc., 28 U.S.C. The Court below agreed with Sterling that Farben could not maintain its suit but did not concur in Sterling's view that it was entitled to a judgment on the merits under the rules cited and therefore dismissed the action without prejudice to Farben to institute and maintain a new action when the disqualification deemed by the court to have been imposed by Executive Order No. 8389, April 10, 1940, 5 Fed. Reg. 1400 as amended, Executive Order No. 8785, June 14, 1941, 6 Fed. Reg. 2897, pursuant to Section 5(b) of the Act has been removed. See 148 F. Supp. 733 (1957).

The Joint Resolution upon which Sterling relies is as follows: "That the state of war declared between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution [Oct. 19, 1951]: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947 was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been

vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest." Following the enactment of the Joint Resolution President Truman on October 24, 1951 proclaimed a termination of the state of war with Germany. Proc. 2950, 16 F. R. (Oct.), p. 10,915.

Farben has advanced several theories under any one of which it asserts that it is entitled to maintain the present action. We will discuss its principal contention only for we deem it to be dispositive of the appeal. Put briefly Farben's principal argument is that the Joint Resolution and the Presidential Proclamation gives it *locus standi* in the court below and entitles it to maintain the suit even if it be the fact that its property under the Joint Resolution still remained subject to vesting and seizure. Sterling asserts that the "status" of the property under the Joint Resolution remains the same as when Farben was an enemy alien and since as an enemy alien it was unable to maintain a suit in our courts, it cannot do so now. We cannot agree.

Our primer in resolving the controversy is, of course, the Trading with the Enemy Act, as amended. We need not discuss the provisions of the Act at length for its purposes and its application are too well known. It is sufficient to state here that it authorized the President to sequester or seize property of enemy governments or enemy aliens, *inter alia*, as defined by Section 2, to the end that the United States might successfully prosecute all objects of war. United States v. Chemical Foundation, 272

U.S. 1 (1926); Koehler v. Clark, 170 F. 2d 779 (9 Cir. 1948). See Dulles, The Vesting Powers of the Alien Property Custodian. 28 Cornell L.Q. 245 (1943). See also the First War Powers Act, 55 Stat. 839 (1941), 50 U.S.C.A. App. Title III, amending Section 5(b) of the Trading with the Enemy Act. It is agreed that Farben was an enemy alien. It is also agreed that the property, the choses-in-action, which are the subject of this suit were never seized.

Nothing in the Act prohibits an enemy alien from maintaining a suit in our courts. In respect to the bringing of suits Section 7(b) of the Act provides in pertinent part: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of the war. . . ." In short Congress in respect to an enemy maintaining a suit within the United States was content to rely on decisional or common law. The early rule of law, sometimes referred to very generally as "the common law rule," that the King's subjects had a duty to plunder the King's enemies, subsequently modified to a prohibition, personal to an enemy that *qua* enemy he could not maintain a suit, discussed in Petition of Bernheimer, 130 F. 2d 396 (3 Cir. 1942), has been so altered that the Supreme Court has stated that "the sole objection to giving judgment for an alien goes only so far as it would give aid or comfort to the other side." Ex Parte Kawato, 317 U.S. 69 (1942), quoting in part from Berge-Forbes Co. v. Heye, 251 U.S. 323.

We are somewhat troubled by the statement in Kawato that "Section 7 bars from the courts only an 'enemy or ally of an enemy'", 317 U.S. at p. 75, but we are of the opinion that a failure to authorize a suit is a bar to suit when the strict common law rule that an enemy cannot maintain a suit in our courts is in effect, and that this is what the Supreme Court had in mind. Cf. Ex Parte

Colonna, 314 U.S. 510 (1942), wherein it was stated *per curiam* by the Supreme Court refusing leave to file a petition for writs of mandamus and prohibition to be issued to this court: "This provision [Section 7(b)] was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts."[1] It follows that we must hold that though the property, choses-in-action, was available to Farben prior to the declaration of war between the United States and Germany on December 11, 1941, 55 Stat. 796, upon the declaration of a state of war by Congress on that date, the right of Farben to institute suit was then suspended. The disability caused by the suspension was a personal one as we have stated. It was not a substantive failure of the causes of action. They continued to exist but could not be sued upon in a court in the United States.

On December 31, 1946, the President proclaimed the cessation of hostilities of World War II. See Proclamation 2950, *supra*. Then came the enactment of the Joint Resolution of October 19, 1951 with which we are concerned and Proclamation 2950 by the President followed it by four days. Whether or not Farben could have maintained its suit during the period from December 31, 1946 to October 19 or 21, 1951, is a question with which we need not concern ourselves for the suit at bar was commenced on September 28, 1955.

We are of the opinion that Farben is entitled to maintain its suit. The purpose of the Joint Resolution and its proviso is made very clear by its legislative history. The Joint Resolution was enacted at the request of the President. The Senate Report, Sen. Rept. 892, 82nd Cong., 1st

[1] Even if this authoritative decision as to suspension did not exist the legislative history of the Act and the prior decisions of the Supreme Court given in the final paragraph of the opinion, 314 U.S. at p. 511, and which need not be repeated here, would leave no doubt as to the correctness of our conclusion.

Sess., Para. 8 (1951), refers to the Presidential message, quoting from it the reason for the President's request. This was that it was necessary to retain control of German property already vested and possibly to vest other German property, even though the war had terminated.

Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies but deemed it necessary to make certain that the President should retain the right to vest certain German property. The proviso of the Joint Resolution was designed to effect this end; a result which was deemed to be in doubt "unless expressly provided for in new legislation."[8] The terms of the proviso were held to effect the

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[8] [sic] The President wrote as to why the vesting power should not lapse, as follows: "Most of this German property has already been identified and vested. This Government does not intend to embark on any new program in this field. However, some of the property already subject to vesting is believed to be cloaked or hidden and not yet discovered, and some is still under examination or subject to legal proceedings. Most of the property remaining unvested is involved in problems of conflicting jurisdiction between this and other governments, which are in the process of settlement by negotiation under authority of legislation which was enacted in September of last year.

"Should the vesting power lapse immediately, this Government would find it difficult to wind up this program in an orderly way, or to carry out its commitments for the equitable settlement of intergovernmental differences relating to enemy property."

[8] The purpose of the proviso of the Joint Resolution was stated as follows: "In the absence of treaty provisions, however, there may be legal obstacles to the continued vesting of German property, after the termination of the state of war, unless there are changes in our existing statutes. According to the terms of the Trading With the Enemy Act, many of its powers expire at the 'end of the war,' a phrase which the act defines to mean the date of proclaiming the exchange of ratifications of a treaty of peace, or an earlier date fixed by Presidential proclamation. There is some doubt that the vesting powers of the Trading With the Enemy Act can be exercised after the termination of the state of war, unless expresly provided for in new legislation.

"This doubt should be eliminated, and it should be made clear that the Congress intends the vesting of German property for the purpose of paying war claims to continue." See Sen. Rept. 692, 82nd Cong., 1st Sess., Para. 8.

result intended. Ladue & Co. v. Brownell, 220 F. 2d 468 (7 Cir. 1955). In brief it was the intention of Congress to effect peace between the Federal Republic of West Germany and German nationals and the United States and to restore the normal rights and relations ordinarily in effect betwen friendly peoples but to retain and obtain control of Germanic property in the United States under Section 5(b) of the Act where necessary.[4] We have no doubt the legal effect of the Joint Resolution and the Proclamation engrafted on the Trading with the Enemy Act was to wipe out the suspension of the right of a German national to bring suit in the United States.

The error of the court below lies, we believe, in its approach to the term "status" as employed in the Joint Resolution. While the court properly held that property of a former German enemy alien was subject to vesting and seizure at the will of the Executive, the primary concern of both the President and the Congress was with the power of the Executive to vest property and not with access to courts in the United States. The term "status" is properly used in respect to a relationship to property, viz., ownership of property or a right to possess property. The proviso deals with ownership in or a right to property. The right to bring a suit, to access to a court may not be

[4] By 1951, as we have indicated, the German people in the Western Zones of Germany had created the Federal Republic of West Germany resting upon a democratic constitution which had been approved by the western occupation powers. That Republic became a member of many international organizations and prepared to take an active part in assuring world peace. The United States was trading with Germany, and property which was brought into this country after 1947 was not subject to vesting. General License 94, 31 C.F.R. §131-94 (1947 Supp.), 12 F.R. 2051 (1954). Under such circumstances Congress considered it paradoxical and inconsistent that Germany should retain "enemy status." As a result, the Joint Resolution was enacted so that the "technical and legal relationships between the United States and the Federal Republic of Germany should be made to conform with reality." Sen. Rept. No. 892, Oct. 8, 1951, Part 4.

described properly as a status. It is a general right of a procedural, not of a substantive, character. One does not say that a plaintiff possesses the status to bring a suit. He either has a right to maintain a suit or he does not but his right of access to a court is a personal qualification and is not a *status*.

We conclude therefore that Farben is entitled to maintain its suit and, if the nature of its causes of action and the evidence permit, to secure judgment in the court below. Beyond this the way is pointed out by Zittman v. McGrath, 341 U.S. 446, 449-552 (1951), which held that attachment levies against American holders of claims against German banks were not nullities though, of course, transfer of the funds could not be effected without a license. See Propper v. Clark, 337 U.S. 472 (1949), Orvis v. Brownell, 345 U.S. 183 (1952), Mr. Justice Douglas's dissenting opinion *id.* at p. 191, and Polish Relief v. Banca Nationale Rumaniei, 288 N.Y. 332, 43 N.E. 2d 345 (1942). In Zittman the claims had been vested in the Alien Property Custodian, while Farben's claims have not been seized. Public Circular No. 31, 8 C.F.R. §511.331(d), throws light upon the problem confronting us. This explains the purpose of General Ruling No. 12, 8 C.F.R., §511.212, promulgated pursuant to Section 5(b) of the Trading with the Enemy Act. In pertinent part Section 511.212(d) states that the Treasury does not desire to interfere with litigation concerning enemy aliens "so long as it is clearly understood that judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property." In so holding we assume *arguendo* that Farben's claims are still blocked or frozen by Executive Order 8389 as amended by Executive Order 8785 and General Rule No. 12. We need go no further to dispose of the appeal at bar for Farben may not secure a judgment against Sterling. If Farben should

secure a judgment against Sterling and then seek execution on the judgment, it will be necessary for the court below to determine whether General License No. 101, Section 511.101, 8 C.F.R. (Cum. Supp.) has freed Farben's claims then reduced to judgment.

The judgment of the court below will be reversed with the direction to proceed with the case in accordance with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

District of New Jersey

FARBENFABRIKEN BAYER, A. G., a corporation,
Plaintiff,

vs.

STERLING DRUG, INC., a corporation,
Defendant.

OPINION

C-209-55

Filed—Feb. 5, 1957.

William F. Smith,
Judge, United States District Court.

Smith, District Judge:

The plaintiff in this action, a corporation organized under the laws of Germany, was formerly an enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act of 1917, 50 U.S.C.A., App. 2(a). The complaint is in four counts, each of which states a separate and distinct claim: first, a claim for profits allegedly due under a contract; second, a claim to property held by the defendant; third, and in the alternative, a claim for damages for breach of contract; and fourth, a claim based

upon a breach of trust. The respective claims, according to the allegations of the complaint, are predicated on an alleged breach of contract which occurred in 1941, or shortly thereafter, and prior to January 1, 1947. The exact date of the alleged breach of contract is unimportant. The claims, although not seized, were subject to seizure and vesting under the Act.

The defendant filed an answer in which it is alleged, as an affirmative defense, that the plaintiff has no right to "institute or maintain" the action. The defense rests solely upon an express limitation in House Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U.S.C.A., App. XX. The defense is raised at this time on the dual motion of the defendant, to wit, a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A, and a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

The Joint Resolution, supra, is determinative of the issue raised by the defendant. The Resolution reads as follows:

> "* * *, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, ANY PROPERTY OR INTEREST WHICH PRIOR TO JANUARY 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE UNDER THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT OF OCTOBER 6, 1917 (40 STAT. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, SHALL CONTINUE TO BE SUBJECT TO THE PROVISIONS OF THAT ACT IN THE SAME

MANNER AND TO THE SAME EXTENT AS IF THIS RESOLUTION HAD NOT BEEN ADOPTED and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior thereto, under that Act, of Germany or of any person with respect to any such property or interest." (Emphasis by the Court).

The Joint Resolution by its express terms reserved the right of the United States to seize property which was "subject to vesting or seizure under the provisions of the Trading with the Enemy Act" prior to January 1, 1947.

The force and effect of the Joint Resolution is fully discussed in the excellent opinion by Judge Swaim in the case of *Ladue & Co. v. Brownell*, 220 Fed. 2d 468, cert. den., 350 U. S. 823. It is therein stated, at page 471: "* * * the Joint Resolution which officially terminated the war with Germany expressly reserved and extended the power of the United States to seize for its own use all property located in the United States which prior to January 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE under the Trading with the Enemy Act, and which was owned by nationals of Germany. The reservation of this power was an integral part of formally bringing the war to a close. Cessation of hostilities between the United States and Germany had occurred with the unconditional surrender of Germany on May 8, 1945. From that date to October 19, 1951, when the Joint Resolution was approved, only a technical state of war had existed between the United States and Germany. During that period of more than six years the Government had continued to seize property in this country belonging to German nationals." (Emphasis by the Court).

It is further stated at page 471: "In the reservation of the power to seize the property of German nationals Congress may have had in mind that such seizures would tend

to serve as a deterrent to a third war with Germany, but it is certain from the Legislative History of the Joint Resolution, * * *, that the proceeds of the property seized were to be used to remedy the evils which had arisen from the war; that the proceeds of the seized property were to be used to pay the just and legitimate claims against the United States arising from the war in accordance with the War Claims Act of 1948. Seizure of the property of enemy aliens for this purpose was clearly a proper exercise of the war powers."

There can be no doubt that as to property which "was subject to vesting or seizure" prior to January 1, 1947, the right of the United States was preserved and the enemy status of a German corporation was continued, notwithstanding the termination of the state of war. The disqualification incident to the enemy status of a German corporation was likewise continued. It is well established that a nonresident enemy alien, until the disqualification is lifted by a treaty of peace or otherwise, may not invoke the jurisdiction of the Court. *Johnson v. Eisentrager*, 339 U.S. 763, 776; *Ex Parte Colonna*, 314 U.S. 510, 511; *Sec. 7(b) of the Trading With the Enemy Act*, 50 U.S.C.A., App. 7(b). This principle applies to a corporation organized under the laws of an enemy state.

We are of the opinion that a German corporation may not prosecute an action to enforce a right of property which is subject to seizure by the Alien Property Custodian under the provisions of the Trading With the Enemy Act, at least until the right of seizure is definitely terminated by law. It follows that the plaintiff may not maintain the instant suit at this time.

The plaintiff argues that the proviso contained in the Joint Resolution was abrogated by "the events" which followed the approval of the said Resolution. We have carefully examined the documents upon which the plaintiff

relies and we are of the opinion that the argument is without merit. We find nothing in these documents inconsistent with the proviso contained in the Joint Resolution. We therefore make only brief reference to these documents.

We must be guided in our interpretation of these documents by a fundamental principle of construction. It is well established that repeals "by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty." *Johnson* v. *Browne*, 205 U. S. 309, 321; see also *United States* v. *Lee Yen Tai*, 185 U. S. 213; *Whitney* v. *Robertson*, 124 U. S. 190. A joint resolution regularly adopted and approved has the force and effect of a statute.

The plaintiff relies firstly, on the "Treaty of Friendship, Commerce and Consular Rights" ratified on July 21, 1953 and concluded on November 5, 1954. This treaty makes applicable, "as a provisional measure pending the conclusion of a more comprehensive" treaty, the "Treaty of Friendship, Commerce and Consular Rights," concluded on December 8, 1923, 44 Stat. 2132.

The pertinent provision of Article I of the latter treaty reads as follows: "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." This provision cannot be construed as a repeal of the Joint Resolution. The language reads in future and is consistent with the right preserved under the Joint Resolution, to wit, the right to seize and vest property subject to seizure and vesting prior to January 1, 1947.

The plaintiff relies secondly on the "Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany," signed on October 29, 1954 and ratified on July 27, 1955. The pertinent provision of Article VI of this treaty reads as follows: "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice * * * within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." This provision, like the provision contained in the earlier treaty, cannot be construed as a repeal of the Joint Resolution. The language, as in the earlier treaty, reads in future and is consistent with the right preserved under the Joint Resolution.

The plaintiff relies finally on the "Bonn Occupation Agreements" of May 26, 1952 as amended by the "Paris Protocol" of October 23, 1954. There is nothing in these agreements which may be construed as a repeal of the Joint Resolution. It is to be noted that Article 3, paragraph 1, of the "Convention on the Settlement of Matters Arising out of the War and the Occupation" impliedly, if not expressly, recognizes the right reserved under the said Resolution. The pertinent language reads as follows: "The Federal Republic (of Germany) shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of a state of war, * * *."

It does not follow, however, that the defendant is entitled to prevail on the present motion. A judgment under either Rule 12(c) or Rule 56(b) is essentially a judgment on the merits and may be entered only upon a conclusive determination of the issues of law. The only relief to which the defendant is entitled at this time is a dismissal of the action without prejudice; if and when the disqualifi-

cation incident to the enemy status of the plaintiff is lifted, either by treaty or otherwise, the plaintiff may have a right to maintain its action in a court of competent jurisdiction.

The motion for judgment will be denied. The present action, however, will be dismissed, without prejudice to the right of the plaintiff to institute and maintain a new action when the disqualification is lifted.

APPENDIX C

TRADING WITH THE ENEMY ACT OF 1917

Act of Oct. 6, 1917, Ch. 106, 40 Stat. 411
50 U. S. C. App. §§1-40 (1952)

"§2. Definitions

"The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act [sections 1-6 and 7-39 of this Appendix]—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.'

* * * * *

"§7. Lists of enemy or ally of enemy officers, directors or stockholders of corporations in United States;

acts constituting trade with enemy prior to passage of Act; conveyance of property to custodian; voluntary payment to custodian by holder; acts under order, rule, or regulation.

• • • • •

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1-6 and 7-39 of this Appendix].

• • • • •

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [said sections], and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

• • • • •

"§9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation,

where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."